



The EU External Energy Policy and the Law: Does the EU Really Matter?

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SUSTAINABLE ENERGY UNITED IN DIVERSITY – CHALLENGES AND APPROACHES IN ENERGY TRANSITION IN THE EUROPEAN UNION

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with M. Reese and B. Vanheusden (eds)

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CHAPTER 12

THE EU EXTERNAL ENERGY POLICY AND THE LAW: DOES THE EU REALLY MATTER?

NICOLAS PRADEL

1. INTRODUCTION

Energy has always been at the centre of the European Community integration process. Both the Treaty establishing the European Coal and Steel Community in 1951 and the Treaty establishing the European Atomic Energy Community (also called the ‘Euratom Treaty’) in 1957, specifically dealt with the most important energy sources of those times: coal and nuclear energy.¹ However, coal and nuclear energy very quickly had to compete against the use of oil and natural gas for electricity generation, industry and transportation.

As European domestic energy resources were limited, the need to import energy was at first managed by the Member States. However, the multiplication of energy supply crises,² the increased environmental threats due to energy consumption³ and the development of a liberalised EU internal energy market⁴ led to a greater involvement of the European Union in the field of external energy policy.

With the entry into force of the Lisbon Treaty on 1 December 2009, the EU acquired explicit and effective competence in the field of energy policy.⁵ Article 194 of the TFEU sets out ambitious objectives for this policy. In substance, the Union policy on energy aims to ensure the security of the energy supply in the EU and to contribute to a more sustainable production and use of energy in Europe but also implicitly around the world.

¹ On the history of the EU energy policy, see FAM Alting von Geusau (ed), *Energy in the European Communities* (AW Sijthoff 1975) 213; G de Carmoy and G Brondel, *L’Europe de l’énergie. Objectif 1992 et perspectives 2010* (Office for Official Publications of the European Communities 1991) 171; WG Jensen, *Energy in Europe: 1945–1980* (GT Foulis 1967) 203, and NJD Lucas, *Energy and the European Communities* (Europa Publications 1977) 175.

² From the Suez crisis in 1956 to the energy transit disputes between the Russian Federation, Ukraine and Belarus in 2006 and 2009.

³ Namely, climate change and air pollution.

⁴ On the history of the three liberalisation packages of the EU energy internal market (1996–1998, 2003, 2009) see D Buchan, *Energy and Climate Change: Europe at the Crossroads* (Oxford University Press 2009) 218.

⁵ Prior to the entry into force of the Lisbon Treaty, general EU energy policy was based on indirect legal bases (especially the provisions in the Treaty relating to the internal market, competition rules, common commercial policy, trans-European networks, the environment and the flexibility clause). See C Blumann, ‘Les compétences de l’Union européenne dans le domaine de l’énergie’ 4 (2009–2010) *Revue des Affaires Européennes – Law and European Affairs* 738. We will not examine the EU’s external energy policy before the entry into force of the Lisbon Treaty in this article.

While Article 194 TFEU does not explicitly mention any external action in the field of energy, the application of the theory of ‘implicit powers’, now codified in Articles 216(1) TFEU and 3 (2) TFEU, enables the EU to develop a real external energy policy.⁶

What is striking about the EU external energy policy is that it principally resorts to the law in order to achieve its objectives. This policy, which may be described as a ‘*legal external policy*’ according to the expression invented by Guy de Lacharrière,⁷ was designed to allow the EU to influence the framing process, the interpretation and revision procedures, not only of international energy law but also of the national legislation related to energy in third countries.⁸

As Guy de Lacharrière has pointed out, by focusing on the legal aspects of the international relationships of the States and international organisations, ‘*legal external policies*’ constitute one of the basic building blocks of any foreign policy. They intend to act upon the law at the international level in order to influence its contents and its interpretation consistently to the interests of the governments that initiate them and may have important concrete and symbolic consequences.⁹

By doing so, the EU therefore seeks to influence the way in which third countries address both the rules governing the functioning of their energy market and the protection of the environment.

However, whether and how far such a policy might be effective should be assessed. Can the law really bring about the fulfilment of the objectives of the EU’s energy policy? Can the EU vision and its endeavours play a role in bringing about common and legitimate solutions to current global energy challenges?

⁶ According to the Court of Justice case law first developed in Case 22/70 *Commission / Council* (ERTA/AETR) [1971] ECR 263, the EU derives implicit powers from explicit internal competences. This case law is now codified by Art 216 TFEU which sets out that the Union has competence to conclude an agreement where: the Treaties so provide (explicit competence); the conclusion of an agreement is necessary in order to achieve one of the objectives referred to in the Treaties; the conclusion of an agreement is provided for in a legally binding act; the conclusion of an agreement is likely to affect common rules or alter their scope.

See SS Haghighi, ‘Energy Security and the Division of Competences between the European Community and its Member States’ (2008) 14 *European Law Journal* 461, and E Nefframi, ‘Panorama des relations extérieures de l’Union européenne en matière énergétique’ in C Blumann (ed), *Vers une politique européenne de l’énergie*, (Bruylant 2012) 155.

⁷ See G de Lacharrière, *La politique juridique extérieure* (Institut Français des Relations Internationales 1983) 236.

⁸ See N Pradel, ‘La politique juridique extérieure de l’Union européenne dans le domaine de l’énergie’ in A Bugada (ed), *Énergies, environnement et développement durable* (Presses Universitaires d’Aix-Marseille 2013) 267.

⁹ See de Lacharrière, *La politique juridique extérieure*, 5, 188 and 195. On the similar concept of ‘*normative power/policy*’ in the English language literature see: T Diez, ‘Constructing the Self and Changing Others: Re-considering “Normative Power Europe”’ (2005) 33 *Millennium – Journal of International Studies* 615; A Hyde-Price, ‘“Normative” Power Europe: a Realist Critique’ (2006) 13 *Journal of European Public Policy* 217; I Manners, ‘Normative Power Europe: A Contradiction in Terms?’ (2002) 40 *Journal of Common Market Studies* 235; I Manners, ‘Normative Power Europe Reconsidered’, paper presented to CIDEL Workshop: From Civilian to Military Power: the European Union at a Crossroads? (Oslo, 22–23 October 2004) 25; S Scheipers and D Sicurelli, ‘Normative Power Europe: A Credible Utopia?’ (2007) 45 *Journal of Common Market Studies* 435; S, Wood, ‘The European Union: A Normative or Normal Power’ (2009) 14 *European Foreign Affairs Review* 113.

In reality, the external energy policy of the EU could not function without the law. On the one hand, the law forms both the basis and a constraint for the development of an EU external policy in the field of energy. Indeed, as an international organisation of integration, the EU must comply with the principle of conferral. In addition, the law is the only vehicle that can define a clear allocation of competences between the EU and the Member States in such a politically sensitive area. On the other hand, the law constitutes the policy's main instrument of action because it has the potential to impulse durable changes in third countries. Indeed, it is through its influence on how third countries adopt rules governing the functioning of energy markets and environmental protection in their territories, that the EU seeks both to guarantee the security of its energy supply and to promote the sustainable use of energy all around the world.

2. THE LAW AS A BASIS FOR THE DEVELOPMENT OF THE EU EXTERNAL ENERGY POLICY: THE EU EXTERNAL COMPETENCES IN THE FIELD OF ENERGY

The first role of the law in the field of the EU external energy policy is linked to its role in the division of competences between the Union and the Member States. Indeed, as a regional international integration organisation, the EU complies with the principle of conferral, which provides that competences not conferred upon the Union in the Treaties remain with the Member States.¹⁰ In addition, if EU Member States agree to develop an EU energy policy, that policy is not intended to replace the existing national energy policies (either internal and/or external). A clear definition of the scope of the EU energy policy with regard to the Member State energy policies was consequently required in order to enable the conduct of *parallel but complementary* policies of the 28 Member States and that of the Union.

Under the Lisbon Treaty the so-called ‘general’ energy policy¹¹ is clearly a competence that is shared between the EU and the Member States in accordance with the provisions of Articles 4(2)(i) TFEU and 194 TFEU. However, this shared competence is specific as the second subparagraph of Article 194(2) TFEU specifies that, without prejudice to Article 192(2)(c), the measures necessary to achieve the objectives of the EU energy policy shall not affect a Member State’s right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply.

In fact, Article 194 TFEU establishes three sub-categories of competences in the field of energy.

¹⁰ See Art 4(1) TEU.

¹¹ ie the policy devoted to all the aspects of energy with the exception of the specific missions under the Euratom Treaty. This distinction between ‘special’ and ‘general’ EU energy policies was recently retained by the ECJ in a judgment of September 2012, see Case C-490/10 *Parliament v Council* (ECJ, 6 September 2012), paras 82 and 84. The external energy policy pursuant to the Euratom Treaty will not be discussed in the limited scope of this article.

Firstly, Article 194(1) TFEU defines four areas of *competing competences* shared out between the Member States and the Union concerning the adoption of measures aimed at ensuring the functioning of energy markets, the security of energy supply in the Union together with the promotion of energy efficiency, energy saving, the development of new and renewable forms of energy, and the promotion of the interconnection of energy networks.

In addition, the second subparagraph of Article 194(2) TFEU establishes two areas of *provisionally reserved competence* for Member States with respect to their choice between different energy sources and the general structure of their energy supplies.

These competences are provisionally reserved for Member States because of the reference made in Article 194 TFEU to the procedure of Article 192(2)(c) TFEU. Indeed, to enable the pursuit of the objectives of the EU environmental policy, Article 192(2)(c) TFEU allows the Union to adopt measures significantly affecting Member States choices between different energy sources and the general structure of their energy supplies.¹² It should be noted however that the adoption of measures under Article 192(2)(c) TFEU does not necessarily lead to the complete removal of the Member State competences because Article 193 TFEU stipulates that Member States may maintain protective measures, or introduce more stringent measures, in the field of the environmental policy.¹³

Finally, the issue of the definition of the conditions for exploiting Member States energy resources constitutes a *retained competence* by Member States because the specific procedure provided in Article 192(2)(c) TFEU does not refer to it. This retained competence stems from the principle of neutrality regarding the rules in Member States governing the system of property ownership laid down in Article 345 TFEU.¹⁴ It should be noted, however, that while EU law does not question the Member States' right to regulate the system of property ownership, the exercise of this competence remains subject to the fundamental principles of EU law.¹⁵

Similarly, the reading of Article 347 TFEU to which reference is made in the Declaration 35 ad article 194 TFEU, highlights a second *retained competence* by Member States in respect of the right to take measures in certain situations affecting national security or involving international commitments contracted for the purpose of maintaining peace and international

¹² In this matter the European Parliament and the Council shall act in accordance with the ordinary legislative procedure and after having consulted the Economic and Social Committee and the Committee of the Regions. However, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, may make the ordinary legislative procedure applicable to these matters.

¹³ Such measures must be compatible with the Treaties. They shall be notified to the Commission, which will verify whether they constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States, in which case the Commission may initiate infringement proceedings against a Member State that fails to comply with EU law principles.

¹⁴ See Blumann, 'Les compétences de l'Union européenne', 744.

¹⁵ See, eg, Joined Cases C-105/12 to C-107/12 *Staat der Nederlanden v Essent NV (C-105/12)*, *Essent Nederland BV (C-105/12)*, *Eneco Holding NV (C-106/12)* and *Delta NV (C-107/12)* (ECJ, 22 October 2013), paras 36–38.

security.¹⁶ However, the exercise of this retained competence by Member States must comply with the conditions set out in Articles 347 and 348 TFEU.

Finally, it should be noted that although Article 194 TFEU remains silent on any external action of the EU in the field of energy policy, the Union may undertake, either alone or jointly with Member States (*‘mixed agreements’*), the negotiation and the conclusion of international agreements related to energy issues by virtue of the theory of implicit competences now codified in Articles 216(1) TFEU and 3(2) TFEU. Indeed, in view of the EU’s energy dependence on imports from third countries, it is clear that, in some cases, the security of supply in the Union or the functioning of the energy market will implicitly require an external policy. The European Commission has been negotiating with Azerbaijan and Turkmenistan since 2011 a legally binding Treaty to build a Trans-Caspian Pipeline System on this basis.¹⁷ Similarly, based on a mandate from all Member States, since 2012 the European Commission has been negotiating an agreement with Russia and Belarus to establish rules for the operation of Baltic electricity networks as long as synchronous operation persists.¹⁸ These two international agreements will be the first, since the signing of the Treaty establishing the Energy Community in 2005,¹⁹ to be concluded by the Union without the participation of the Member States.

It therefore follows from an interpretation of the provisions of Article 194 TFEU that the law provides a clear division of competences, and consequently a sharing out of ‘specialities’, between the Union and the Member States in the field of external energy policy. On the one hand, the Union has competence to define a general framework in the field of energy in the EU but also in the context of EU’s external relations. On the other hand, Member States retain their right to decide on the operating conditions of their energy resources, their choice of energy sources and the general structure of their energy supplies.

However, this use of the law as a basis to enable the development of an EU energy policy is not its only role. The law also serves to focus attention on the EU vision of international energy challenges and in effect constitutes its main tool of action and of influence at the world level.

3. THE LAW AS AN INSTRUMENT OF EU EXTERNAL ENERGY POLICY

In order to implement its external energy policy, the EU uses several instruments. In addition to a political dialogue with the main energy producing and consumer countries,²⁰ scientific

¹⁶ According to Art 4(2) TEU, national security remains indeed ‘the sole responsibility of each Member State’.

¹⁷ See European Commission, ‘EU Starts Negotiations on Caspian Pipeline to Bring Gas to Europe’ (Press Release, 12 September 2011, IP/11/1023).

¹⁸ See G Oettinger, ‘Integration of the EU and CIS Electric Power Systems and Markets – A Way of Increasing Security of Supply’, speech at Eurelectric – CIS Power Council Conference (Brussels, 31 October 2012).

¹⁹ See below.

²⁰ Eg in the framework of the International Energy Forum, the EU–OPEC energy dialogue, the energy dialogue with China, Russia and the United States of America.

cooperation²¹ and economic and financial supports,²² EU external energy policy resorts principally to the law in order to ensure the security of energy supply in the EU and to contribute to more sustainable use of energy around the world.

The EU preference for the law can be explained by the very nature of the European integration process but also by the advantage of the EU in the normative field. Indeed, the EU seeks to use the economic weight of its internal market to influence the definition of global preferences and values.²³ In addition, it is clear that only legal rules can durably influence the behaviour of energy producers and consumers in the world.

In this respect, the EU conducts a broad range of multilateral initiatives within the framework of the International Atomic Energy Agency, the United Nations Framework Convention on Climate Change, the Kyoto Protocol and the World Trade Organization.²⁴

These initiatives have had their train of success and failures, however it is interesting to focus in this paper on three less widely known EU actions, namely the Energy Community Treaty concluded by the EU with the Balkans and some Eastern European countries (3.1.), the EU–China energy dialogue (3.2.), and the EU–US energy cooperation (3.3.). These initiatives illustrate the EU endeavours to project its influence beyond its borders but also its attempts to launch proactive dynamics at the universal level. They highlight both the potential and the shortcomings of the EU’s legal external policy in the field of energy.

3.1. *The Energy Community: engaging the neighbours*

A very topical example of the EU attempt to spread its vision of energy and environmental regulation further afield is the Energy Community. The Energy Community Treaty²⁵ was signed on 25 October 2005 and entered into force on 1 July 2006.²⁶

So far, the EU,²⁷ six Balkan countries²⁸ and two European Eastern countries have ratified this Treaty.²⁹ However, the geographical scope of application of this Community might be ex-

²¹ Eg the Generation IV International Forum (GIF), the international ITER project for fusion.

²² Eg the European Investment Bank loans for energy projects in third countries. See <http://www.eib.org/projects/priorities/energy/index.htm?lang=en>.

²³ See Z Laïdi, ‘The Normative Empire: The Unintended Consequences of European Power’ (2007) *Les cahiers européens de Sciences Po* No 05/2007, 24.

²⁴ See ‘IAEA–EU Joint Action: Partnership in Improving Nuclear Security’ (IAEA 2013) 16; J Delbeke (ed), *The EU’s Climate Policy* (Claeys & Casteels 2014) 160; Y Selivanova, ‘The WTO and Energy: WTO Rules and Agreements of Relevance to the Energy Sector’ (2007) *International Centre for Trade and Sustainable Development Issue Paper* No 1, 44.

²⁵ See the Energy Community Treaty (20 July 2006) OJ L198/18 (hereinafter ‘EnC Treaty’).

²⁶ In 2013, the Energy Community Ministerial Council unilaterally decided to extend the duration of the Treaty for a further ten years, from 2016 to 2026, see its ‘Decision D/2013/03/MC-EnC on extending the duration of the Energy Community Treaty’ (24 October 2013).

²⁷ The EU, represented by the European Commission, is a permanent Vice-President of the organisation. It chairs most of the institutional meetings. At the same time, any EU Member State may obtain the status of a Participant (Art 95 EnC). As a member of the EU, the Participants have *per se* an obligation to comply with the *acquis*

tended with the negotiation for the accession of Turkey and the expected applications from Georgia and Armenia. Links have been also established since 2012 with the INOGATE Programme, which is developing energy co-operation between the EU, the littoral states of the Black and Caspian Seas and their neighbouring countries.³⁰ Azerbaijan is also considering applying to enter into formal negotiation for accession to this Treaty, which could represent an interesting development for the EU strategy of energy supply diversification.³¹

Substantially, the Energy Community has three levels of ambition.³² In the short term, Contracting Parties shall implement the *acquis communautaire* on energy, environment, competition and renewable energies.³³ This process aims at creating open and transparent national energy markets in the territory of the Contracting Parties.

In the medium term, an integrated energy market should be put in place across the region. This integrated energy market should enable free cross-border trade in energy between the non-EU Contracting Parties and take into consideration climate-related matters and social issues (working conditions in the energy sector, public service obligations, the protection of vulnerable customers).

In the long term, this regional market should finally be fully integrated in the European Union's internal energy market.

To date, this EU initiative presents both strengths and weaknesses. Looking on the bright side, it is true that the EU energy security might be strengthened thanks to the implementation of the third EU energy package by some energy transit countries like Ukraine.³⁴ From the EU point of view, the application of the same rules for the functioning of energy markets and the

communautaire. A country, with a Participant status, has the right to take part in all the institutional meetings of the Energy Community. Presently, as many as 17 EU Member States hold the status of Participants (Austria, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Hungary, Italy, Netherlands, Poland, Romania, Slovenia, Slovakia and United Kingdom).

²⁸ Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Montenegro, Serbia and Kosovo under the jurisdiction of the UN Interim Administration Mission in Kosovo.

²⁹ Moldova and Ukraine. They respectively joined the Energy Community in 2010 and 2011.

³⁰ See 'INOGATE and the Energy Community Secretariats Define Areas of Cooperation' (21 February 2012), available at http://www.energy-community.org/portal/page/portal/ENC_HOME/NEWS/News_Details?p_new_id=5561.

³¹ The European Commission and the Council are also considering how to include Northern Mediterranean countries like Algeria and Libya in this Energy Community, even this is not ready to happen soon regarding the very different contexts in these countries and the nature of their relationships with the EU. See European Commission, High Representative of the Union for Foreign Affairs and Security Policy, 'Joint Communication to the European Council, the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean' COM(2011) 200 final, 10 and the Council Conclusions on Strengthening the External Dimension of the EU Energy Policy, 3127th Transport, Telecommunications and Energy, Council meeting (Energy Items) (Press Release, 24 November 2011) 3–4.

³² See Art 2 EnC.

³³ For an updated presentation of the *Energy Community acquis* that is continually evolving with the extension of the EU *acquis* in all the fields covered by this Treaty, see http://www.energy-community.org/portal/page/portal/ENC_HOME/ENERGY_COMMUNITY/Legal/EU_Legislation.

³⁴ Ukraine is a key transit country for energy resources from Russia to the EU, particularly for natural gas where some 20% of the natural gas consumed in the EU is transited. 60% of the Russian natural gas exported to the EU passing through Ukraine.

opening of energy markets and networks is to encourage competition and more energy exchanges between EU countries and third countries.

In the same way, the EU environmental objectives should be best achieved thanks to the enlarged scope of application of EU rules on renewable energy targets³⁵ and the application of the Directive 2010/31/EU on the energy performance of buildings.³⁶ Indeed, buildings are central for the success of the EU energy efficiency policy since in Europe nearly 40 per cent of final energy consumption (and 36 per cent of greenhouse gas emissions) takes place in houses, offices, shops and other buildings.³⁷

However, the Energy Community suffers from some evident weaknesses. The case of Ukraine is particularly noteworthy as it shows the limits of the law when confronted by the raw reality of international politics. The decision in November 2013 by Ukraine to suspend preparations for the signing of an association agreement with the European Union together with the series of agreements signed by the Russian and Ukrainian governments in December 2013 on natural gas prices and financial support for Ukraine triggered serious unrest in this country.³⁸ Whatever the outcome, it is clear that the Russian objective is to retain maximum control over Ukraine and its energy network. Indeed, some sources indicate that Russia demanded that Ukraine withdraw from the Energy Community Treaty in return for the signature of these agreements.³⁹

A similar demand was formulated by Russia in the course of negotiations with Moldova for natural gas prices in 2012.⁴⁰ In order to ease tensions, the Ministerial Council of the Energy Community adopted a decision extending the implementation deadline of Article 9(1) of the Directive 2009/73/EC⁴¹ on the unbundling of transmission systems and transmission system operators of natural gas networks to 1 January 2020.⁴² The importance of Moldova and Ukraine in the struggle between the EU and Russia on the issue of the liberalisation of Eastern European energy markets explains the long implementation deadlines granted to these two

³⁵ See the Ministerial Council of the Energy Community, ‘Decision D/2012/04/MC-EnC on the implementation of Directive 2009/28/EC and amending Art 20 of the Energy Community Treaty that defines the mandatory national overall renewable energy targets of the Energy Community Contracting Parties by 2020 (18 October 2012).

³⁶ Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings [2010] OJ L153/13.

³⁷ See European Commission, ‘Report from the Commission to the European Parliament and the Council, “Progress by Member States towards Nearly Zero-Energy Buildings”’ COM(2013) 483 final, 4.

³⁸ R Olearchyk, ‘Ukraine Freezes Talks on Bilateral Trade Pact with EU’ *Financial Times* (21 November 2013); K Hille, ‘Russia Cuts Deal to Finance Ukraine’ *Financial Times* (17 December 2013).

³⁹ N Buckley, ‘Ukraine: A Choice between the European Embrace and the Russian Bearhug’ *Financial Times* (23 January 2013).

⁴⁰ P Smolar, ‘La Moldavie, victime collatérale des tensions entre la Russie et Bruxelles’ *Le Monde* (15 September 2012).

⁴¹ Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L211/94.

⁴² Ministerial Council of the Energy Community, ‘Decision D/2012/05/MC-EnC concerning the implementation of Article 9 of the Directive 2009/73/EC by the Republic of Moldova’ (5 December 2012).

countries regarding the implementation of the EU directive on natural gas energy networks.⁴³ Moreover it will be interesting to follow the progress of the implementation measures of the *energy acquis* in these two countries.

More broadly, as the European Commission itself remarked, the existence of open, transparent and competitive national energy markets in all Balkan Contracting Parties has not been completed yet.⁴⁴ The implementation of EU rules in national laws must be accompanied by true administrative supervision capacity and real domestic enforcement mechanisms. Intensive work is on-going on these aspects and the improvement of the effective implementation of the Energy Community *acquis* is in progress. However, it underlines the essential fact that the law as a tool for the external energy policy requires unfailing scrutiny of its enforcement and constant diplomatic dialogue.

3.2. The EU–China energy partnership and the NZEC initiative

Another interesting EU initiative is the EU–China energy cooperation. If the EU–China dialogue on energy was launched in 1994, it was greatly enhanced in 2005 with the Joint Declaration on Climate Change between China and the European Union.⁴⁵

In this declaration both parties committed to take strong measures to encourage low carbon technology development and to develop and demonstrate in China and in the EU by 2020 advanced near-zero emissions coal technology through carbon capture and storage.

In this context, a joint UK⁴⁶ and EU initiative with China called the Near-Zero Emission Power Coal Initiative (NZEC) was formally launched with the conclusion of a Memorandum of Understanding between the UK and China in 2005⁴⁷ and the subsequent signature of two complementary Memoranda of Understanding between the EU and China in 2006 and 2009.⁴⁸

⁴³ The market opening for households is 1 January 2015. Whilst the general implementation deadline of market opening for non-households was set for 1 January 2008 for Balkan Contracting Parties, it is 1 January 2013 for Moldova and 1 January 2012 for Ukraine. The implementation of Art 9(1) of this EU directive will be on 1 June 2016, Art 9(4): 1 June 2017 and Art 11: 1 January 2017 for Ukraine. The same deadlines will be applicable for Moldova at the exception of Art 9(1), which shall be implemented by 1 January 2020.

⁴⁴ See European Commission, 'Report from the Commission to the European Parliament and the Council under Article 7 of Decision 2006/500/EC (Energy Community Treaty)' COM (2011) 105 final, 5.

⁴⁵ See European Commission, 'EU and China Partnership on Climate Change' (MEMO/05/298, 2 September 2005) and P de Matteis, 'EU–China Cooperation in the Field of Energy, Environment and Climate Change' (2010) 6 *Journal of Contemporary European Research* 449.

⁴⁶ Among EU Member States, the UK is a global leader in CCS.

⁴⁷ Memorandum of Understanding between the Ministry of Science and Technology of the People's Republic of China and the Department of Energy and Climate Change of the United Kingdom (21 December 2005, not published in the OJ).

⁴⁸ Memorandum of Understanding between the Ministry of Science and Technology of the People's Republic of China and the European Commission on Cooperation on Near-Zero Emission Power Generation Technology through Carbon Dioxide Capture and Storage (Phase I) (Shanghai, 20 February 2006, not published in the OJ); Memorandum of Understanding between the Ministry of Science and Technology of the People's Republic of China and the European Commission on Cooperation on Near-Zero Emission Coal (NZEC) Power Generation

The NZEC Initiative aims to build a coal-fired power plant associated with carbon capture and storage facilities (CCS). CCS involves capturing the carbon dioxide in fossil fuel combustion and long-term storing in geological formations such as depleted oil wells. As the IPCC notes, CCS technology can reduce carbon dioxide emissions from large industrial sources and coal-fired power stations by around 85 per cent and could be essential technology to significantly reduce greenhouse gas emissions and allow the continued use of fossil fuels without damaging climate security.⁴⁹

The NZEC project has been undertaken in a three-phase approach. Phase 1 (2007–2009) was dedicated to the study of the options for demonstration and building capacity in CCS. Phase 2 (2009–2012) involved further development works on CCS options including legal, environmental and economic aspects. Phase 3 (2012–2015) will involve the construction of a demonstration plant to be completed by 2015.

Although, at present, clean coal at the world level is a polite euphemism, the NZEC project has created a fair bit of interest in China for CCS whereas nobody was interested in this issue before the European initiative.⁵⁰ Thanks to this initiative, and even though the NZEC project is not yet completed, about half of all newly identified CCS projects are now located in China⁵¹ and the country is planning several coal and gas power plants that can bury their carbon deep underground.⁵²

Beyond the demonstration of the feasibility of such a technology, the NZEC project aims to contribute to the diffusion of technical and legal standards for world CCS technology dissemination on the model of the directive 2009/31/EC related to CCS activities.⁵³ Indeed, this directive was adopted after the work of the STRACO₂ Project with which China was associated. The aim of the STRACO₂ Project was to support regulatory activities for CCS in Europe and to determine what legal framework might be appropriate for the development of CCS technology in China.⁵⁴ It should have a strong influence on the future legal regime for CCS development in China.

Technology through Carbon Dioxide Capture and Storage (CCS) (Phase II) (Nanjing, 30 November 2009, not published in the OJ).

⁴⁹ See B Metz, O Davidson, H de Coninck, M Loos and L Meyer (eds), *Carbon Dioxide Capture and Storage* (Cambridge University Press 2005) 431.

⁵⁰ See G de Cock, 'The European Union as a Bilateral "Norm Leader" on Climate Change vis-à-vis China' (2011) 16 *European Foreign Affairs Review* 89.

⁵¹ Worldwide, there are just 8 CCS projects in operation, 9 in construction and 72 planned, see 'The Global Status of CCS: Update, January 2013' (Global CCS Institute 2013) 9.

⁵² B Plumer, 'How's That Big Carbon-Capture Push Going? Slowly. Too Slowly' *The Washington Post* (11 October 2012); D Coneybeare, 'China Could Lead in CCS' *Utilities Unbundled* (Issue 14, June 2013) 52–53.

⁵³ Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006 [2009] OJ L140/114.

⁵⁴ See STRACO₂, *Support to Regulatory Activities for Carbon Capture and Storage: Synthesis Report* (July 2009) 88–100.

Thanks to this cooperation, based both on technical and legal cooperation, the EU and China are seeking to become leaders in the development of this nascent technology on the world scene.

3.3. *The EU–US energy cooperation: the Energy Star programme*

Finally, the EU–US energy cooperation and especially its ENERGY STAR programme on energy efficiency labelling of office equipment, constitute further example of the use of the law by the EU in order to achieve concrete objectives in the field of energy policy.

ENERGY STAR is a voluntary energy-efficiency labelling programme established in 1992 by the US Environmental Protection Agency (EPA). It aims to help businesses and individuals to save money and protect the environment through superior energy efficiency specifications for computers, monitors/displays and imaging equipment (copiers, printers, scanners, etc).

Three international agreements were concluded between the EU the EU–US in 2001, 2006 and 2013⁵⁵ in order to enable the implementation of the ENERGY STAR programme in the EU. In Europe, the programme is now linked to mandatory public procurement and SMEs constitute the majority of its participants. This programme seems to be effective in moving the market towards greater efficiency. It is estimated that ENERGY STAR will succeed by 2020 in reducing the energy consumption of the installed base of computers, displays and imaging equipment in the EU by more than 30 per cent.⁵⁶

As it is implemented in several other economies, including Japan, Canada and Australia, through agreements similar to that with the EU, this program may lead to the creation of market driven efficiency standards around the world. That is truly important as information and communication technologies, are among the fastest growing electricity end-users worldwide.

However, this EU–US cooperation on energy efficiency will not be sufficient in itself. As Fatih BIROL, chief economist and director of global energy economics at the International Energy Agency, rightly pointed out at the end of 2012, the world is far from an optimal energy efficiency level of investments. In developed countries, only a half of satisfactory targets

⁵⁵ Agreement between the Government of the United States of America and the European Community on the co-ordination of energy-efficient labelling programmes for office equipment (*ENERGY STAR I*) [2001] OJ L172/3; Agreement between the Government of the United States of America and the European Community on the co-ordination of energy-efficient labelling programmes for office equipment (*ENERGY STAR II*) [2006] OJ L381/26; Agreement between the Government of the United States of America and the European Community on the co-ordination of energy-efficient labelling programmes for office equipment (*ENERGY STAR III*) [2013] OJ L63/7.

⁵⁶ See European Commission, ‘Communication from the Commission on the implementation of the ENERGY STAR programme in the European Union in the period 2006 – 2010’ COM (2011) 337 final, 8.

of energy efficiency improvements in industrial processes have been realised and 80 per cent of energy saving still needs to be achieved in the construction and restoration of buildings.⁵⁷

4. CONCLUDING REMARKS

These three initiatives show how the EU seeks to influence the way that third countries determine both the rules governing the functioning of their energy market and the protection of the environment.

Despite the weaknesses inherent in the law and the long road ahead before full implementation of these initiatives, the EU's legal external policy in the field of energy could foster some evolutions in the world energy landscape.

Indeed, beside the negotiation of a legal framework to combat climate change, the EU pursues its aim to stimulate the development of energy and climate legislations in a maximum of third countries. It is clear that the more third countries develop energy and climate legislation, the more favourable the conditions for a global legal framework for combating climate change will become.⁵⁸

However, the legitimacy and the relevance of the EU choices in the field of energy may be questioned. Concerning the regulation of energy markets, it is clear that the EU demand for liberalization may engender some frictions with certain third countries. Is the EU choice for the liberalisation, if not in reality, for an *ordoliberal* management⁵⁹ of energy markets, really the most efficient from an economic point of view? This question to which economists will need to answer in the future is both fundamental and very complex as the demand for liberalization seems to be the only type of external energy action that the EU can promote owing to the intricate division of competences between the EU and its Member States and the essential fact that liberalization in the EU itself will only come true if the EU's suppliers go through unbundling.⁶⁰

⁵⁷ M-B Baudet, 'L'efficacité énergétique doit être une priorité pour les États – entretien avec Fatih Birol, économiste en chef de l'AIE' *Le Monde* (13 November 2012).

⁵⁸ As Christiana Figueres, the new Executive Secretary of the United Nations Framework Convention on Climate Change, said: 'It's very difficult to have international regulation before you have enough national legislation', see E Crooks, 'Compelling Case for Global Deal on Climate, Says UN' *Financial Times* (14 January 2014).

⁵⁹ Indeed, EU energy law and policy combine both a regulatory approach (compliance with competition rules, public service obligations, etc) and economic interventionism (financial support to energy infrastructures, research and innovation). On the ordoliberal foundations of the European Union see: F Bilger, 'L'école de Fribourg, l'ordolibéralisme et l'économie sociale de marché' (8 April 2005), available at <http://www.blogbilger.com/esm/ecolededefribourg.pdf>; and J Drexler, 'La Constitution économique européenne – L'actualité du modèle ordolibéral' (2011) *Revue internationale de droit économique* 419.

⁶⁰ See T Romanova, 'Towards a Comprehensive Theory of Legal Harmonization between the EU and a Third Partner: The Case of the EU–Russian Energy Dialogue', paper presented at the Warwick University Conference: Governing Energy In Europe and Russia (Warwick, 3–4 September 2010) 10. On the existing economic research dealing with the question of the relevance of the liberalisation of energy markets see, eg, A de Hauteclocque, *Market Building Through Antitrust: Long-Term Contract Regulation in EU Electricity Markets* (Edward Elgar

Regarding finally the issue of environment and climate change regulations, it is clear that the EU must be able to negotiate balanced and equitable agreements especially with developing countries.

The road ahead will certainly be a long one. Public and private interests will need to be commensurate in order to provide a clear and legitimate direction for the governance of energy issues at the world level. Nonetheless, what is at stake in this process is fundamental because it will determine the wealth of States and the way of life of billions of people in the future.

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